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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 139

MARIO MERCADO E HIJOS,

Petitioner,

vs.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

The jurisdiction of this Court to review the decision of the Circuit Court of Appeals is established by Section 237 of the Judicial Code, paragraph (b), 28 U. S. C. A. 344. Also rule 38, paragraph (5) of the Rules of this Court.

Uncontradicted Facts of This Case

According to the requirements of Rule 38, paragraph (5), a question of federal law which has not been, but should be settled by this Supreme Court, should be successfully presented by Petitioner in its Petition and Brief. In our

view, Petitioner has achieved that aim. The language of section 205(d) of the Emergency Price Control Act (50 USCA App. 925 (d)), that of section 205(e) (50 USCA App. 925(e)) and that of section 4(a) (50 USCA App. 904(a)), read on the light of the admitted facts of this case, plainly warrant the issuance of the writ. The admitted facts are as follows:

1. The contract price, at which defendant agreed to sell and deliver its molasses, was the ceiling price for this commodity established by the OPA regulation prevailing at the time of the agreement. (Resp. Br. p. 2).

2. It was not the regulation existing or prevailing at the time of the contract what defendant is being charged with violating, but two subsequent amendments enacted, one May 9, 1944 (No. 32) providing for 13.6 per gallon *delivered at the mill;* another of August 2, 1944 (No. 45), *adding to the language of the first amendment, the phrase "or at the mill tank."* (Resp. Br. p. 5).

The first amendment (No. 32), fixing a dollar and cents price for molasses *delivered at the mill,* came to defendant's knowledge through the newspapers. The second amendment (No. 45) adding the phrase "or at the mill tank," *instead of merely at the mill,* was never notified in any way to the public, except by the fact that it was published in the Federal Register in Washington.

3. The OPA which followed the practice of giving advice through Besosa, Head of the Price Panel, now attaches no meaning or significance to the advice given in the name of the OPA by said official. (Resp. Br. 4, 6).

The Circuit Court of Appeals in its opinion impliedly labors under the idea that it was an easy matter for defendant who (1) before making the sale agreement consulted and obtained advice from the OPA as to the ceiling price

then prevailing; (2) acted according to the advice and complied with the Regulation (RMPR) prevailing at the time of the sale, to keep up with the government here in Washington in regard to the possible meaning and effect upon the contract of subsequent amendments to the regulation under which defendant acted. In regard to these subsequent amendments, it may be of some use to notice:

1. Amendment 32 of May 9, 1944 established the price for molasses *delivered at the mill;* amendment 45 of August 2, 1944, added the phrase *"or at the mill tank."*

2. By the time amendment 45 was enacted, *all molasses had been paid for and were already deposited at the buyer's risk in a tank belonging to petitioner two miles away from the mill.* (Resp. Br. p. 5. Also Original Record, pgs. 12-13).

3. The molasses were withdrawn by the buyer by December 7, 1944, and, by December 20, 1944, *without giving any opportunity to the seller,* the OPA filed suit.

4. The difference between the contract price and the price reduced by the subsequent amendments, was $42,501.36. The OPA, it seems to us, acted under the presumption that a seller who meets amending regulations as those of this case, can humanly be required to return the $42,501.36 already collected on mere suspicion that the subsequent amendments affected the contract already consumated under the ordinary rules of sale. But this, in our judgment, is oppressive and ignores elementary human considerations, which should never be ignored in the sound application of laws.

Respondent's Contentions Only Show That This Writ Should Be Issued

Let us examine more fully, respondent's contentions. Respondent contends in its brief that the deliveries were not deliveries pursuant to an agreement made under the terms of the Emergency Price Control Act. Section 205(d)—in respondent's theory—bars the imposition of a penalty for action taken pursuant to any provision of the Emergency Price Control Act or any regulation, order, price schedule "or agreement thereunder." The phrase "agreement thereunder"—respondent continues saying—means an agreement under the terms of the Act, etc.

But the respondent's contentions offer serious doubt. It is the language of the statute what firstly controls a court in determining its meaning. By placing in the statute the term "or agreement thereunder" after the terms *regulation, order, price schedule* and *requirement,* Congress meant, in our judgment, "or agreement thereunder" *to refer to an agreement under a regulation, order, price schedule, requirement, as well as to an agreement under the terms of the Act.* That in Section 5 the Act refers to "pricing agreements," is nothing but mere coincidence and cannot be used as meaning that whenever the word agreement is used it means a "pricing agreement" and not an agreement under a regulation, *as the one fairly and honestly entered by defendant with the buyer after consulting the OPA officials, showing thereby the unquestionable good faith of the transaction.*

To limit the phrase "or agreement thereunder" only to "pricing agreements" under section 5 of the Statute as the Government pretends, is a subtle and forced construction for the purpose of limiting the operation of section 205(d). Courts cannot by construction vary the terms of a statute. *McClusky* v. *Cromwell,* 11 N. Y. 593, 601. (Black Interpretation of Laws, pages 45, 56.)

Section 205(d) Provides an Exception for Cases as Ours

Respondent also claims that, if appellant's interpretation is correct, it would amount to a complete nullity of the provisions of Section 4(a) of the Act (50 USCA 904(a)), which make it unlawful to sell or deliver any commodity in violation of a price regulation, "regardless of any contract or 'agreement' heretofore or hereafter" made.

However, "heretofore and hereafter," refers to the date of the Act. It does not refer to the date of any regulation which might come afterwards. And furthermore, section 205 (d) protects obviously an act which technically might be regarded as illegal under Section 4(a), but which Section 205(d) exempts from damages or penalties *because the illegality occurs on account of a subsequent amendment to the regulation under which the defendant made the contract and under circumstances making it unjust to penalize a seller.*

In other words: Section 205 (d) excepts from the operation of the Price Control Act, *insofar as any court may impose damages or penalties under it,* acts done or omitted to be done *pursuant to any regulation "or agreement thereunder."*

> Sec. 205(d). No person shall be held liable for damages or penalties in any . . . Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act *or any regulation, order, price schedule, requirement or agreement thereunder . . . notwithstanding that subsequently such provision, regulation, order, price schedule, requirement or agreement may be modified, rescinded, or determined to be invalid.* (Italics ours.)

By enacting section 205(d) Congress meant, either that the thing excepted might be within the general purview

of Section 4(a), or else, Congress wanted to make it clear that a person contracting pursuant to an existing regulation should not be subjected to damages or penalties because of a subsequent amendment to the regulation under which he acted; the application of which subsequent amendment being not easy to determine at first hand as shown by the conflict of opinions of the courts passing upon the merits of this case.

It is plain that the withdrawal of the molasses by the buyer from September 12, to December 7, 1944, became illegal only because of the subsequent amendment to the RMPR, under which, the sale agreement was made. And it should be noticed, as a very important fact, that by June 24, 1944, all the molasses have been paid for and were deposited at the buyer's risk in the tank from where they were withdrawn. (Or. Record, 12-13.)

The Government contention brings out the reasons for the enactment of Section 205(d). It was the intention of Congress that violations committed because of a subsequent amendment to the regulation under which the defendant acted could not be reached by an action for damages or penalities. An exception in a statute is similar to a proviso (Black on Interpretation of Laws, Second Ed. 427 et seq.). Only that an exception exempts absolutely from the operation of an enactment while the proviso defeats its operation conditionally. An exemption takes a case out of a statute which would otherwise be within the statute and is interpreted restrictively.

> "Office of proviso in statute is to except something from operative effect or to qualify or restrain generally a substantive enactment to which it is attached." *Andreas v. Clark,* (1934) 71 F. 2d. 908, Cert. denied, 55 C. St. 111, 293 U. S. 555, 79 L. Ed. 657.
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> "Office of 'proviso' is usually to make exceptions from enacting clause, and make clear precedent matter,

but may be used to introduce new matter." *U. S. v. Mullendore,* 35 F. 2d 78.

"The particular intent expressed in a proviso or exception will restrain the general language of the enactment, and where a proviso is directly contrary to the purview of the statute, the proviso is good and not the purview, since the former gives expression to the later intention of the Legislature." *Rutgers, Chapter of Delta Upsilon Fraternity v. City of New Brunswick,* 32 A. 2d 364, 130 N. J. L. 216, affirming 28 A. 2d 759, 129 N. J. L. 238.

The dictum in *Foster v. Bowles,* 114 F. (2d) 870, 874 (Em. App. 1944), pretends to restrict section 205(d) to suits arising only because of a refusal to carry out an agreement entered into according regulations which are later amended and then the defendant refuses to carry out the agreement. But the language of Section 205(d) does not justify the limitation of its operations to that type of cases. It is plain from the context that the damages or penalties that no court can hold a person liable for under section 205(d) are the very same damages or penalties for which a person may be responsible under the Act. They are not necessarily the damages under the general theory of damages. The attempt in the dictum to limit the operation of the statute to actions suggested by the dictum is unjustified. For a better understanding of the dictum in the Foster case, we are copying the full paragraph in which the dictum appears.

"We are not called upon to decide whether complainant would be subject to punishment if under the present state of the regulations it completes its contract. This question will arise only in the event complainant completes its contracts and enforcement proceedings are brought in some court other than this. So far as the validity of the regulation reducing the maximum price is concerned, we think the indication of an intention not to permit damages or penalties by reason of a

party's compliance in good faith with the provisions of a regulation is no indication of an intention to require an existing regulation to remain unchanged. On the contrary by providing an immunity from damages or penalties for parties acting pursuant to regulations, Section 205(d) obviously assumes that contracts will not be carried out according to their terms. We have considered other arguments raised by complainant and find them to be without merit." *Foster v. Bowles*, 144 F. 2d 874.

Conclusion

Our case is an important one from the standpoint of the amount involved. The defendant is being charged with the payment of $42,501.36 damages and $21,250.68 penalties. The fears of what may happen if section 205(d) is interpreted as suggested by us, are by no means justified. The government is the one with power to enact regulations and amend them, and, if any body is in disadvantage, it is not the government but the public. In any way, Congress provided for a case as ours a specific provision protecting the seller and the facts of this case plainly show that they were those contemplated by Congress when enacting section 205(d) of the Statute.

WHEREFORE it is respectfully submitted that the petition for a writ of certiorari be granted.

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